No. 93-1906

(2)
Supreme Court, U.S.
OCT 13 1994

IN THE

Supreme Court of the United States

October Term, 1994

THE TUXEDO UNION FREE SCHOOL DISTRICT, *et al.*,

Petitioners,

against

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT N. ISSEKS
(Counsel of Record)
40 Park Place
Goshen, NY 10924
(914) 294-7292

Attorney for Respondent

Of Counsel:
ALEX SMITH

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
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Questions Presented

1. Does the enforcement of an otherwise valid state statute that prohibits electioneering within 100 feet of a polling place violate the free speech clause of the First Amendment in the absence of statutorily required distance markers, or their functional equivalent, defining the boundaries of the no-electioneering zone where the public is given absolutely no notice from monitors or anyone else that there is a prohibited zone and where enforcement of the statute is directed toward a single person only?

2. Does the "bad faith" exception to the abstention doctrine enunciated in *Younger v Harris*, 401 U.S. 37 (1971), permit a federal district court to enjoin a pending state administrative proceeding, initiated to determine the validity of disciplinary charges against a tenured high school teacher, based upon a finding by the district court that the charges were brought by a school district (a) acting with an "animus" toward that teacher, (b) attempting to enforce a statute narrowly restricting political speech against that teacher in a strictly *ad hominem* manner, and (c) where the school district itself had violated that very same statute by not advising the public in any way that there was a prohibition against political speech in a certain zone?

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BRIEF IN OPPOSITION TO PETITION

SUMMARY OF THE ARGUMENT

Contrary to the assertions made by petitioners on the very first page of their petition to this Court, the decision below neither "conflicts with the applicable decisions of this Court" nor "calls into question the constitutionality" of any election law of any state. Rather, this case involves a flagrant violation of basic and well established free speech and due process principles. Nor is the decision below a "dramatic departure" from the principles of abstention. Petitioners' *ad hominem* enforcement of New York's statutory restriction of political speech, directed solely toward respondent's expressions of criticism of the School District administration, coupled with the School District's indifference to the integrity of their polling place, falls squarely within the bad faith exception to the *Younger* doctrine.

This case is a perfect illustration of the sort of abusive, unchecked censorship that can result when the holding in *Burson v Freeman*, 112 S.Ct. 1846 (1992) is applied in an unprincipled and retaliatory manner. Petitioners are attempting to terminate respondent, who has been teaching for the School District for 18 years, because respondent was electioneering within 100 feet of the entrance to the School District polling place on the day of the School Board elections, May 6, 1992. Petitioners complain that respondent violated New York State Education Law §2031-a, the very same statute that petitioners themselves violated throughout that election day.[1]

Petitioners decided not to mention to this Court that the School District not only failed to place markers or post notice of the

[1]The complete statute reads as follows:

Electioneering within one hundred feet of polling place prohibited; distance markers.

(Footnote continued on next page.)

electioneering prohibition, but had no one monitoring the entrance to the polling place to make sure that there was no electioneering within the 100-foot area.[2] Petitioners decided not to inform this Court that they had no one on site to advise the public that there was any restriction at all on their right to political

---

(Footnote continued.)

> 1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.
>
> 2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

N.Y. Education Law 2031-a (McKinney's 1988).

[2]The conspicuous and less than candid absence of any mention of the lack of monitoring in petitioner's submission to this Court is troubling. (6-9) (Unless otherwise indicated, all numerals refer to the petition submitted to this Court by petitioners)

speech and that respondent was the only person to whom petitioners ever gave notice that day.[3]

There is no issue concerning petitioners' noncompliance with Education Law §2031-a. There is no dispute that petitioners failed to place any markers or post any other type of sign anywhere, even though Superintendent Fliegner knew about the 100-foot prohibition during the morning of the election. But just as important as petitioners' noncompliance with Education Law §2031-a is petitioners' failure to designate someone to monitor the school's entrance throughout the day to enforce the 100-foot prohibition. The consequence of having no one continuously watching the entrance, coupled with petitioners' failure to place the statutory markers or to post any other type of sign, was that citizens who were in the area were never given notice of the restriction on their right to free political speech. Respondent was the only one so notified.

Rather than making any attempt to comply with the statute's express and precise mandates or to otherwise place the public on notice of the statute's prohibition, petitioners decided to enforce the 100-foot restriction according to their own selective personal discretion. It is this subjective and arbitrary element in petitioners' method of enforcing the prohibition that makes it constitutionally repugnant. Petitioners' sparse and selective attention to the 100-foot radius was not only in direct contravention of the statutory requirement that the markers be conspicuously and continuously placed throughout the day; it undermined the compelling state interest enunciated by this Court in *Burson* in maintaining the integrity of the electoral process.

[3]This omission allows petitioners to make totally inappropriate interpretive statements such as, "In essence, the panel majority concluded that, because the School District failed to post distance markers at 100 feet from the polling place, Cullen was privileged—even after he received actual notice of the electioneering prohibition—to continue to electioneer at locations he knew were inside the 100-foot zone."(12)

Petitioners' restriction upon respondent's political speech within the 100-foot zone, without paying any attention to whether anyone else expressed political speech within that zone at any other times during that day, constituted a purely arbitrary method of restricting a fundamental First Amendment right. If this Court were to permit election officials to leave unposted and unmonitored the area which is supposed to be restricted and to enforce the political speech prohibition whenever and against whomever they choose, this Court would in effect be granting these officials the *unreviewable* discretion to determine which electioneering would be tolerated within the restricted zone and which would be prohibited. This constitutionally repugnant discretion is precisely what petitioners gave themselves on May 6, 1992.

It matters not for First and Fourteenth Amendment analysis whether anyone other than respondent electioneered within the restricted zone on the day of the election. Petitioners' enforcement of the restriction would be nonetheless arbitrary because they never did anything to make sure that there was no other electioneering going on within the zone that day. Petitioners cannot argue that their restriction of respondent's political speech furthered any legitimate state interest for the simple reason that petitioners have no idea whether anyone else might have been electioneering within the restricted zone. Such is the essential arbitrariness of petitioners' restriction upon respondent's First Amendment right. This very restriction served only to undermine the integrity of the polling place. When the compelling state interest is *integrity* (unlike interests such as security or public safety) it can never be advanced, as a matter of law and logic, by a restriction that is enforced arbitrarily.

As will be more fully explained below, petitioners' discretionary, *ad hominem* method of enforcing Education Law §2031-a cannot pass constitutional scrutiny because (1) it completely failed to advance the compelling state interest in (and sole pur-

pose of) the 100-foot restriction—to protect the integrity of the electoral process, (2) it was not narrowly tailored to advance that compelling state interest, and (3) it amounted to an abusive, bad faith exercise of unbridled censorship power, used by petitioners to punish an outspoken teacher they do not like and who they had been trying to get rid of.

Statement of the Case

1. Background.

Respondent has been a high school science teacher for petitioners' school district for approximately 18 years. Since February, 1990, petitioners have commenced and prosecuted three separate sets of disciplinary charges against respondent pursuant to New York Education Law §3020-a. Prior to this time respondent had never been the subject of any disciplinary proceeding. It is the third set of petitioners' disciplinary charges against respondent that forms the basis of this lawsuit.

Petitioners' first §3020-a proceeding against respondent consisted of two charges. The first complained that respondent took certain students on an unauthorized field trip in an airplane one Saturday to conduct physics experiments. Respondent admitted to the three-member §3020-a hearing panel that he did in fact take his students on this field trip. Petitioners' second charge alleged that respondent "was 'mooned' by (exposed to the buttocks of) six (6) students in his Physics Class... followed by an invitation by (him) for the students to do so...." (86a-87a) Respondent denied this charge and the hearing panel dismissed it as "trivial, inconsequential, of no significance." (92a) In setting its penalty on the first charge, a fine of $1,250.00, the panel stated that "the fine should not be punitive" because respondent "is clearly a fine teacher" and that "such teachers should be encouraged and even cosseted." (94a)

In their second set of §3020-a charges petitioners complained about a scientific experiment that respondent conducted in the school cafeteria in the presence of upper elementary grade level students. Petitioners alleged that they told respondent not to perform the particular experiment, which consisted of spraying "Binaca" mouthspray and igniting it to demonstrate its effect, and that respondent was insubordinate in doing so. Respondent admitted to the hearing panel that he performed the experiment but denied that he was insubordinate or that the experiment was in any way dangerous. The panel sustained the charge and suspended respondent for four months without pay. (107a, 112a) Petitioners, however, were not satisfied with this punishment fixed by the panel and they appealed to the New York State Commissioner of Education arguing that this science teacher of 18 years experience deserved to be terminated.[4] (32a)

2. Petitioners' third Education Law 3020-a proceeding against respondent.

After school hours on May 6, 1992, the day of petitioners' School Board election, respondent was passing out a flier in front of the high school entrance. The flier complained that the election process was unjust in that the two incumbents running for re-election were running unopposed while the three challengers were running against each other for the remaining seat on the board. (78a)

That election day, Fliegner, who was responsible for the conduct of the election, knew about the 100-foot prohibition of Education Law §2031-a because someone had just inquired about that very subject and he, Fliegner, researched the requirement in a handbook. (33a, 38a) Nevertheless, neither Fliegner nor anyone else did anything to make sure that the 100-foot prohibition was being enforced before 3:30 that afternoon. Up to that point, no

[4]Although the result of this appeal is not part of the record below, petitioners chose to insert it in their petition and appendix.

markers had been emplaced as required by §2031-a(l), nor had petitioners bothered to designate anyone to monitor the entrance, in lieu of the markers, to make sure that there was no electioneering going on in the restricted zone. (22a-23a, 38a) Petitioners hadn't even bothered to measure the 100-foot radius or to post any sign giving notice of the prohibition. (8a-9a,38a)

What first interrupted petitioners' insoucience concerning the protection of their polling place was when, at about 3:30 p.m., a member of the staff went inside the building and advised Fliegner that respondent was distributing a flier on the front steps of the school—a flier that was critical of the School District administration. (34a) Now, for the first time that day, Fliegner took action to make sure that there wasn't any electioneering in the area: Fliegner went out to confront respondent and to inform him that he was not to distribute his flier within the 100-foot radius. (34a) Respondent protested, saying that it was after school hours,[5] he had a right to be there and that he was not doing anything wrong. (34a) When Fliegner continued to insist that respondent remove himself, respondent replied, "You make up the rules as you go along." (34a-35a)

On several occasions later that day and evening, petitioners observed respondent in the subject area and took measures to remove him, including calling the police. (34a-38a) Significantly, however, petitioners still never took any steps to place the public on notice of the 100-foot prohibition.[6] (8a-9a, 22a-23a, 33a, 38a)

[5]According to the teachers' contract that was in effect on May 6, 1992, 3:30 p.m. was after hours for respondent (33a).

[6]For example, at about 4:00 p.m., when Fliegner was finished with his confrontation with respondent, he told Nancy Bourke, the District Clerk, that he was leaving, that there had been some trouble with respondent regarding electioneering, and that if Bourke had any problems she should call the police. Fliegner did not instruct Bourke to make sure the restricted area remained clear, and Bourke didn't bother to check on the entrance until one half hour later. (36a-37a)

Their focus was upon respondent exclusively, as they still never bothered to post any sign or designate anyone to monitor the area. (8a-9a) Throughout the entire election, right up to when the polls closed, petitioners made no effort to provide uniform notice or uniform enforcement of the content-based free speech restriction. (8a-9a)

Four months later, petitioner's School Board voted to bring this third set of §3020-a disciplinary charges against respondent for "illegal" electioneering. Robert Quinn and Michael Santoianni, the incumbents who were the subjects of criticism in respondent's flier, were two of the Board members who voted in favor of punishing respondent. (39a)

REASONS FOR DENYING THE WRIT

POINT I

Petitioners' arbitrary and selective infringement upon respondent's right to free political speech did nothing to advance the compelling state interest in maintaining the integrity of the electoral process.

In *Burson v Freeman*, 112 S.Ct. 1846 (1992), this Court made it clear that N.Y. Education Law §2031-a is facially valid because a 100-foot prohibition of political speech around a polling place advances the compelling state interest in maintaining the integrity of the electoral process. While *Burson* stands for the proposition that the government may prohibit electioneering within 100 feet of a polling place, it does not endorse the view that this prohibition may be enforced by any available means. This Court was quite explicit that its decision did not address "as applied" challenges and that such challenges should be made by an individual prosecuted for conduct allegedly violative of the statute. *Burson*, 112 S.Ct. at 1857, n 13. This Court noted that, if success-

ful, such challenges "would call for a limiting construction rather than a facial invalidation." *Id.*

The question that is presented in this case is whether petitioners did in fact advance that compelling state interest when they restricted respondent's political speech without making any attempt to provide uniform notice or enforcement of the statute's prohibition respecting the citizenry at large. Petitioners' actual notice argument misses this point entirely and *Bethel Sch. Dist. No. 403 v Fraser*, 478 U.S. 675 (1986), relied upon so heavily by petitioners, has nothing to do with this case. Respondent has never argued that he personally did not receive notice; the issue of adequacy of notice to respondent has never been raised.[7]

Respondent maintains that petitioners' failure to make sure that all persons in the area (not just respondent) knew of the restriction on their right to free political speech, coupled with petitioners' failure to make sure that no person in the area (not just respondent) electioneered within the 100-foot radius, utterly failed to advance—and effectively destroyed—that very integrity of the electoral process which the statutory restriction was intended to protect and which this Court in *Burson* held to be its constitutional justification.

Petitioners had no reason to restrict respondent's free political speech after they had paid absolutely no attention to the 100-foot radius from the time the polls opened that morning until 3:30 that afternoon. As stated succinctly in the *Burson* dissenting opinion: "Especially when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well." *Burson*, 112 S.Ct. at 1864.

[7]This is why the dissent below completely misses the mark when it mischaracterizes the majority opinion below as basing respondent's rights as to where to electioneer under "the guise of lack of notice". (18a)

A. *The nature of the Burson compelling state interest.*

In *Burson*, this Court upheld the constitutionality of a Tennessee statute prohibiting solicitation of votes and display of campaign materials within one hundred feet of a polling place.[8] After an examination of the evolution of election reform, both in this country and abroad, this Court concluded that a restricted area around polling places was necessary.[9] *Burson*, 112 S.Ct. at 1852-56. First, the Court found that "a State has a compelling interest in protecting voters from confusion and undue influence." *Burson*, 112 S.Ct. at 1851. Second, this Court recognized that "a State 'indisputably has a compelling interest in preserving the integrity [and reliability] of its election process itself.'" *Burson*, 112 S.Ct. at 1852 (citations omitted). This Court found that because these asserted interests involved the right to vote and the preservation of the "purity of elections" they justified the statute's infringement upon political speech in a public forum. *Id.*

B. *Petitioners' demonstrated indifference to the integrity of their electoral process.*

As the district court correctly observed, petitioners "made no effort whatever to police the area or send an agent out there to remain throughout the voting period or see whether other people were possibly electioneering."(26a) If petitioners had any concern

[8]*Burson* does not address the specific issue of narrow tailoring raised in this case. *Burson* involved a facial challenge to a statute. Similar to Education Law §2031-a, the Tennessee statute under scrutiny in *Burson* required objective "boundary signs" to be placed at the one hundred foot distance. *See* Tenn. Code. Ann §2-7-111(a) (1991). There was no evidence of non-compliance by election officials. Therefore, *Burson* did not address the issue of the method of enforcing the prohibition.

[9]Of course, the "restricted area" around the polling place which this Court held in *Burson* "was necessary," never existed at petitioner's polling place. There can be no "restricted area" if the public was never informed of the restriction.

for the integrity of their polling place, they would have made some effort to comply with Education Law §2031-a. At the very least, they would have made sure that no one, not just respondent, at no time during the day, electioneered within the prohibited area. But they didn't. Instead, Fliegner simply directed respondent to remove himself, called the police to remove him, and later went home for dinner. Neither Fliegner nor anyone on his behalf ever bothered to make sure that *the public* was being put on notice of the restriction on their right to free political speech.

Not having bothered to comply with the mandates of §2031-a, and not having bothered to place the public on notice of that statute's prohibition, petitioners are now unable to state to this Court whether anyone other than respondent knew of the 100-foot prohibition on the day of the election. With no person monitoring the entrance, petitioners are now unable to state whether anyone other than respondent electioneered within the restricted area. With no markers and with no signs, petitioners haven't even a reasonable ground for presuming that no one other than respondent electioneered within the restricted area. Thus petitioners may not now claim that their electoral process on May 6, 1992, ever had any of the "integrity" which formed the cornerstone of this Court's *Burson* decision. Petitioners, in other words, may not now argue that they in any way advanced the compelling state interest which is the constitutional prerequisite to the infringement upon the content-based political speech engaged in by respondent.

The dissent in the Court of Appeals is simply wrong to assert that the majority's selective enforcement rationale was "purely speculative since the [respondent] apparently has never claimed even to have seen anyone else who might have been electioneering in the area where he was."(17a) First, the majority's rationale deals not just with selective enforcement, but with selective notice, as well. Second, it was not up to respondent to make sure that the area was monitored from the time the polls opened early that morning until he arrived at the school entrance at "3:30 p.m., after his workday" (6), a span of some nine hours or so. This was the School District's responsibility—a responsibility imposed not only by Education Law

Section 2031-a, but by the reasoning of this Court in *Burson*—and a responsibility which petitioners chose to completely ignore. As noted by the majority below, "the School District's ability to document [respondent's] activities is in dramatic contrast to the virtual absence of information about the activities of others."(10a)

The suspicions expressed by the dissent notwithstanding, the fact that respondent did not claim he saw anyone else electioneering is certainly no basis for inferring that no one else was, especially when respondent was teaching for most of the day and was therefore not even at the site. As the majority below observed, "A government body charged with enforcing a law that seeks to preserve the delicate balance between the exercise of First Amendment rights and the promotion of fair and honest elections should not be permitted to ignore safeguards designed to preserve that balance, and then, at day's end, be able to report only on the activities of a single individual with whom bad blood already existed." (10a-11a) Petitioners and, apparently, the dissent below, are insensitive to that "delicate balance."

Because the 100-foot prohibition is constitutional only by virtue of its advancement of the compelling state interest found by this Court in *Burson*, and because petitioners' method of enforcement did nothing to insure the integrity of their polling place (since it restricted only respondent's electioneering and did nothing to put the public on notice), petitioners' method of enforcement was not even reasonable, let alone the least restrictive means.

The issue therefore is not one of state statutory construction. Petitioners are mistaken when they assert to this Court that the construction of Section 2031-a "divided the court below."(4) Rather than "constructing" Section 2031-a, the majority below was concerned with the arbitrary method by which petitioners chose to enforce 2031-a:

> Its method of enforcement provided no notice of either the parameters of the campaign-free zone or the nature of the electioneering prohibition itself. Nothing was used in lieu of

> the distance markers, nor was any one person assigned the responsibility of monitoring the campaign free zone for electioneering violations.

(8a) The majority concluded that petitioners' "efforts would appear to have focused exclusively on the activities of [respondent], someone with whom the School district 'had a past history of personal conflict.'" (10a)

Although the dissent below was interested in whether the New York State Legislature intended that the 100-foot prohibition be conditioned upon the placing of the prescribed markers, the majority accurately saw this question as irrelevant. Rather, the majority correctly perceived the issue as one of federal constitutional dimension: whether the prohibition contained in Education Law §2031-a may be enforced by a method which does nothing to protect the integrity of the electoral process and which involves an arbitrary and *ad hominem* focus upon a single dissenting individual.

POINT II

Petitioners' method of enforcing Education Law 2031-a was not narrowly tailored because it failed to provide either objective or uniform notice of the content-based restriction on the right to free political speech.

Because Education Law §2031-a is a content-based regulation of political speech in a public forum, it is not enough that the restriction on its face serves the compelling state interest in protecting the integrity of the electoral process. Petitioners must show that their *method of enforcing* the restriction was narrowly tailored to advance that interest. *See Burson*, 112 S.Ct. at 1851. The only means by which an infringement of content-based political speech may be regulated is the "least restrictive means." *Boos v Barry*, 485 U.S. 312, 329 (1988). In the context of a

content-based regulation on speech, a government regulation is not "narrowly tailored" if less intrusive means than those employed are available. *Id.*

Obviously hoping to catch this Court's attention, petitioners trumpet a false alarm that the opinion below has facially invalidated "the election laws of dozens of other states."(14) Respondent never challenged the facial validity of any election law that lacks a requirement to post markers. The reason is that, in this case, (1) there was neither objective nor uniform notice to the public of *any* kind and (2) there was a bad faith, strictly *ad hominem* enforcement of the electioneering prohibition. Hence there is no occasion in this case to determine whether the markers required by Education Law §2031-a constitute the only acceptable means of providing objective and continuous notice of an electioneering prohibition.

As respondent argued to the courts below, Education Law §2031-a assures that the infringement upon the First Amendment right is enforced in a narrowly tailored manner and therefore provides a *model* of the least restrictive means.[10] This is because the emplacement of markers serves to protect two important, indeed fundamental, constitutional principles. First, the markers clearly and objectively indicate the forbidden area, enabling citizens to conform their conduct according to the law. Second, because the school districts are required to place the markers "at least one-half hour before the opening of the polls and shall remain until the polls are closed" [Education Law §2031-a(1)], all members of the public who are in the area are put on continuous and uniform notice of the prohibition. This is not to say, however, that these two principles can only be served by emplac-

[10]Respondent submits that the least restrictive means of infringing upon the First Amendment rights at issue are provided for in Education Law §2031-a. But this particular proposition need not be decided in this case because of petitioners' remarkable failure to provide *any* uniform notice to the public.

ing markers. Respondent has consistently argued to the courts below that it was the failure to emplace markers *or their functional equivalent*—such as a designated monitor throughout the day—which violated his rights to free speech and due process. Respondent has made no contention—nor did the court below impose any requirement—that a state election statute must contain one specific method of enforcement in order to be constitutionally valid. It must be presumed that officials in other states are not going to engage in the kind of bad faith, *ad hominem* enforcement of their electioneering prohibition that has marred this case.

Respondent contends that the emplacement of markers, or their functional equivalent, ensures equal enforcement of the statute by those entrusted with prosecuting violators. It also lets each and every citizen know that he is not being singled out, since it will be apparent to him that the prohibition applies to everyone, equally, without regard to the content of his electioneering speech. Only by satisfying these two fundamental constitutional requirements can the electioneering prohibition be said to advance its intended goal—protection of the integrity of the electoral process.

A. *The due process function of an objective notice requirement.*

Because we assume that persons are "free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly." *Grayned v City of Rockford,* 408 U.S. 104, 108 (1972). The emplacement of markers or its functional equivalent would provide notice to those who wish to electioneer, thus providing a concise and accurate means of infringing upon the right of free speech. As this Court has noted, "[w]here First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed,' . . . assures us that the legislature has focused on the First Amendment interests and determined

that other governmental policies compel regulation." *Grayned*, 408 U.S. at 109 n 5.

By ignoring the requirements of Education Law §2031-a and by enforcing the prohibition according to their own unauthorized personal discretion, the school officials here entirely undermined the due process interests served by the objective markers. There was no clear line distinguishing between lawful and unlawful conduct, thus increasing the likelihood of arbitrary and capricious enforcement of the prohibition.[11] This, as this Court has emphasized, has a chilling effect on the exercise of constitutionally protected rights. Where an uncertain law "abuts upon sensitive areas of basic First Amendment freedoms it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Grayned*, 408 U.S. at 104.

"[V]ague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable." *Intern. Soc. for Krishna Consciousness v Eaves*, 601 F.2d 809, 823 (5th Cir. 1979).

Petitioners raise a non-issue when they dwell upon whether the distance of 100 feet is the maximum radius which may be restricted under the First Amendment. Respondent never made the frivolous argument that any distance greater than 100 feet would

[11]This was especially true since no one ever bothered to measure the 100-foot radius and point out that distance to respondent. Not even an attempt was made to distinguish lawful and unlawful conduct during most of the day when no school official was outside delineating the forbidden zone. During the period of time when no school official was outside indicating the forbidden zone, this purpose of the statute was completely undermined.

be violative of his right to free political speech. Petitioner's submission is misleading in its suggestion that such an argument was made. When the majority below made the point about respondent's not being able to stand "*just* 100 feet away" (18a), it was not implying that any restriction greater than 100 feet would be violative of the First Amendment. Rather, the point was made to illustrate the problem which arises when an objective delineation of the restricted zone is lacking. Because the statute proscribes electioneering within 100 feet, the members of the public are entitled to know where their speech is prohibited and where it is not. They should not be forced to guess and they should be confident that everyone else is being subjected to precisely the same prohibition. It is the complete lack of objectivity in petitioners' method of enforcement which respondent challenged and which the decision below addressed. Respondent *never* argued that a statutory restriction greater than 100 feet would be unconstitutional.

Petitioner's use of *Schirmer v Edwards*, 2 F.3rd 117 (5th Cir. 1993), like their adequacy-of-notice argument, serves only to distort the issues decided below. When the issue at bar is properly stated—whether the Constitution requires objectivity in the prohibition's enforcement—the Fifth Circuit's reasoning in *Schirmer* is readily seen to be in harmony with the Second Circuit opinion below. In *Schirmer* the appellants argued, *inter alia*, that Louisiana did not have a compelling interest in banning non-ballot political activity nor passive political speech around the polls. Rejecting this argument, the Fifth Circuit approved the view that "an across-the-board ban on politicking was necessary to protect voters' rights because any exceptions to the total ban on political speech would necessarily create the need for on the spot enforcement . . . [and] that to allow any politicking in the campaign-free zone would open the door to subterfuge." *Schirmer*, 2 F.3d at 122. The *Schirmer* Court concluded that "problems with on the spot decision making and varying degrees of enforcement would result in uneven application of the statute." *Schirmer*, 2 F.3d at 122. This is precisely why there must be objectivity in the enforcement of the prohibition and this is precisely the point grasped by the majority below.

In the absence of a clearly marked forbidden zone, petitioners created a condition which operated to inhibit the exercise of First Amendment freedoms. Clearly petitioners' method was not the "least restrictive means" of achieving the compelling state interest. Instead, petitioners' method risked causing citizens to "steer far wider of the unlawful zone" than necessary[12] thereby inhibiting the lawful exercise of the fundamental First Amendment right to express political speech.

B. *The equal protection function of a continuous and uniform notice requirement.*

As stated above, petitioners' method of enforcing Education Law §2031-a, in addition to failing to provide well-delineated objective notice, also increased the likelihood of arbitrary and selective enforcement.[13] While the government may infringe upon constitutional guarantees under limited circumstances, "it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not to all . . . ." *Brown v Louisiana*, 383 U.S. 131, 143 (1966).[14]

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[12]This is exactly what happened when Officer Kelly walked respondent "well outside the 100 feet." (36a)

[13]This Court has cautioned that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108.

[14]The government may not impinge "upon [First Amendment rights] . . . in an arbitrary and discriminatory manner without cause, justification, or reason." *Kreimer v. Bureau of Police for Town of Morrisville*, 765 F. Supp. 181, 195 (D.N.J. 1991). "It is beyond dispute that the government may not penalize or afford different, discriminatory treatment to a disfavored, disliked individual or class of individuals." *Id.*

Before and after respondent was told to cease his electioneering, when the officials were either inside the building or eating dinner in their homes, there was nothing in place, and no one stationed in the area, to prohibit persons from expressing other views (perhaps in support of the unopposed candidates), to prohibit persons from passing out their own fliers unimpeded, or to prohibit persons from engaging in some other form of electioneering.

The dangers inherent in petitioners' random and haphazard method of "protecting the integrity of the electoral process" are obvious. "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute." *Cox v Louisiana*, 379 U.S. 536, 557-58 (1965). The discretion in public officials to determine which views will be permitted "sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* Petitioners' arbitrary method of enforcement "effectively grant[ed] . . . [the School District] the discretion to . . . [punish] selectively on the basis of the content of speech." *City of Houston v Hill*, 482 U.S. 451, 465 n 15 (1987).

Petitioners essentially assumed discretionary censorship powers and authorized themselves to decide when it was appropriate to keep the 100-foot radius clear and when they didn't have to pay any attention to it at all.

What petitioners want this Court to ignore is that their utilization of verbal notice in this case amounted to giving notice only to respondent without ever bothering to make sure that everyone else in the area received the same notice. By fixating upon the fact that other states do not have marker requirements similar to New York's, petitioners attempt to divert attention away from the fact that their method of verbal notice on May 6, 1992 was purely

arbitrary. Perhaps verbal notice could withstand constitutional scrutiny if there were someone continuously monitoring the area to make sure that no one violated the prohibition. But that issue is not presented in this case. Rather, petitioners want this Court to hold that verbal notice of the infringement upon the right to free political speech may be given whenever they please and to whomever they please. This is precisely why respondent was justified in saying to Fliegner, "You're making the rules up as you go along."

In sum, petitioners' method of enforcing the prohibition opens wide the opportunity for abuse. It provides neither objective notice nor uniform notice. The result is unbridled, discretionary censorship power over content-based political speech.[15] As stated above, a restriction on political speech must be narrowly tailored to serve a compelling state interest. In this case, petitioners' method of enforcement, rather than advancing the compelling state interest, actually undermined it, and thus cannot be deemed in any way to be narrowly tailored.

POINT III

Petitioners' retaliatory and *ad hominem* enforcement of the electioneering prohibition falls squarely within the bad faith exception to the *Younger* abstention doctrine

Younger v Harris, 401 U.S. 37, 53 (1971) and its progeny are clear that a federal court should intervene if bad faith prosecution

[15]Just as in the case of vague statutes, petitioners' discretionary, *ad hominem* method of enforcing Education Law §2031-a is "unacceptable" because it "encourages arbitrary and erratic arrests and convictions." *Papachristou v City of Jacksonville*, 405 U.S. 156, 162, (1972); *see also, Poulos v State of New Hampshire*, 73 S.Ct. 760, 767, where this Court reiterated the well-settled principle that a regulation of First Amendment protected activity is invalid if it is left in the "uncontrolled discretion" of those entrusted with its enforcement.

or harassment or other "extraordinary circumstances" are present. *See, e.g., Middlesex County Ethics Comm. v Garden State Bar Ass'n.*, 457 U.S. 423, 435 (1982). It is difficult to imagine a stronger indication of bad faith prosecution than when government officials attempt to punish a person for violating a law which those officials knowingly violated themselves.

In the context of the *Younger* doctrine, "bad faith" generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction. *Kugler v Helfant*, 421 U.S. 117, 126 n 6 (1978). However, a showing that a prosecution was brought in retaliation for, or to discourage, constitutional rights "will justify an injunction regardless of whether valid convictions conceivably could be obtained." *Lewellen v Roff*, 843 F.2d 1103 (8th Cir. 1988), *cert den* 489 U.S. 1033 (1989); *see also, Fitzgerald v Peck*, 636 F.2d 943 (5th Cir. 1981), *cert den* 452 U.S. 916; *Wilson v Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979). In First Amendment cases the strength of the constitutional claim, while not establishing bad faith as a matter of law, strongly corroborates the allegation of the defendant's improper motive. *Winchert v Walter*, 606 F. Supp. 1516, 1522 (D.N.J. 1985).

Even though this case does not involve a First Amendment challenge to the facial validity of a state statute, abstention is inappropriate for the reasons stated by this Court in *City of Houston v Hill*, 482 U.S. at 467-471. Petitioners' bad faith, selective enforcement of a state statute which requires a delicate balance between a legitimate state interest of polling place integrity and the citizen's right to freedom of political speech presents a serious constitutional question that the courts below correctly entertained. As in *Hill*, petitioners'arbitrary method of enforcement is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Hill*, 482 U.S. at 468, *quoting Harman v Forssenius*, 380 U.S. 528, 534-535 (1965). Regardless of any state

court interpretation of Section 2031-a, the federal constitutional question at bar remains. As *Hill* makes clear, where resolution of the federal claim is not dependent upon a question of state law, it is immaterial that state courts have never interpreted the subject statute. *Hill*, 482 U.S. at 469-470.

The district court found that petitioners acted in bad faith by commencing and maintaining the disciplinary charges. In addition to a specific finding that the petitioners' actions rose to a level of "animus," the district court also found that "no disciplinary charges would have been brought except for the content of the pamphlet."(26a) The district court continued:

> Therefore, the Court finds the disciplinary charges were brought in bad faith and maintained and continued in bad faith and constitute an ongoing violation of the plaintiffs First Amendment rights to be free in his speech and not to be harassed or prosecuted in any way for his expressions or based on the content of his expressions since he could not be found to have violated the law because no markers were there.

(26a)

Respondent had been a teacher for petitioners' school district for about eighteen years. As of the day of the election, petitioners had prosecuted two then recent sets of §3020-a charges against respondent and were actively trying to get him fired. Their second set of charges was then still pending and had not yet been determined by the hearing panel when petitioners voted to commence a whole new set of charges aimed at disciplining respondent for violating the same statute that they themselves had violated. Before 3:30 in the afternoon of the day of the election, the school officials in the building had paid no attention to the school's entrance. It was not until a staff member came inside and brought to Fliegner's attention that "Mr. Cullen" was outside

passing out a flier (a flier that was critical of the School District administration) that Fliegner showed any concern about the 100-foot zone. Fliegner's conduct was transparently motivated by his animus against respondent, not by his concern for the integrity of the electoral process. The same is true for the subsequent conduct of the remaining petitioners when they voted to bring these disciplinary charges, as determined by the district court.

There is ample basis in this record for the district court to have drawn the inference that petitioners were acting in bad faith. Such an inference is not only reasonable, it is compelling in view of the significant First Amendment violation involved. *See Winchert*, 606 F. Supp. at 1522.

In essence, petitioners are asking this Court to substitute its own conclusion on the issue of bad faith for the conclusion reached by the district court. It is well established, however, that such *de novo* review is inappropriate. Because the decision whether to abstain "involves a discretionary exercise of a court's equity powers" the test applied "in reviewing district court abstention decisions is whether there has been an abuse of discretion." *Pue v Sillas*, 632 F.2d 74, 78 (9th Cir. 1980) (court reviewing district court's ruling regarding *Pullman* abstention); *see also, Hefner v Alexander*, 779 F.2d 277, 280 (5th Cir. 1985) (applying "clearly erroneous" standard in review of alleged facts that constitute bad faith harassment under *Younger* doctrine). "An abuse of discretion exists when the district court has made an error of law or of fact." *Reuters Ltd. v United Press Intern., Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). A trial court's discretion is exceeded "when the decision reached is not within the range of decisionmaking authority a reviewing court determines is acceptable for a given set of facts." *Id.*

It was readily apparent to the district court that when petitioners commenced their third 3020-a disciplinary proceeding against respondent they were not motivated by a good faith belief

that such charges were necessary in order to protect the integrity of their polling place. It was obvious to the district court that petitioners seized upon respondent's electioneering as an opportunity to bolster their then *ongoing* efforts to get respondent fired.[16] The majority below was correct in holding that the specific findings in the district court's opinion provided the basis for its conclusion that petitioners "sought Cullen's termination and that the charges that Cullen violated Section 2031-a were brought in retaliation for the exercise of Cullen's First Amendment right to protest the school board elections."(13a) As the majority below properly held, "Because the State of New York cannot have a legitimate interest in the disciplinary proceeding, permitting it to continue would not serve the purposes of the *Younger* doctrine..." (13a-14a)

Petitioners' abstention argument, therefore, fails for essentially the same reason their First Amendment argument fails: petitioners refuse to come to terms with the district court's basic finding that the School District engaged in a blatantly *ad hominem* restriction of respondent's fundamental right of political speech. The district court found that petitioners demonstrated a complete indifference to the integrity of their polling place (the sole justification for restricting respondent's speech in the first place). Petitioners abused the limited power accorded them to restrict political speech in their single minded effort to have respondent terminated. This demonstrated indifference to the integrity of their electoral process, coupled with the ongoing

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[16]Petitioners' second set of 3020-a charges against respondent were filed in February, 1992. The third set of 3020-a charges arising out of respondent's electioneering were filed in September, 1992. The hearing panel's penalty decision on the second set of charges was not rendered until October, 1992. When the panel authorized only a penalty of suspension on the second set of charges, petitioners appealed to the State Commissioner, hoping to get respondent terminated.

"grudge fight" which the district court found rose to the "level of a animus", provided ample basis for the finding of bad faith.[17]

In all likelihood this incident never would have occurred if petitioners had complied with the mandates of Education Law §2031-a and set up the required markers. If the markers, or their functional equivalent, had been in place, respondent would have had no cause to say to Fliegner, "You make up the rules as you go along. You use your position, your authority to get your way." Since the markers were not in place, and since there was no other indication to respondent that petitioners were applying the law to anyone other than himself, he was justified in believing that he was being discriminated against and unfairly censored. Petitioners opportunistically decided to try to fire respondent by taking advantage of their own violation of the law. This is blatant bad faith.

In light of the underlying facts and circumstances of this case it cannot be said that the district court abused its discretion by finding that petitioners acted in bad faith by commencing and maintaining the §3021-a disciplinary charges. There is ample proof in the record to support this finding and it should not be disturbed.

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[17]*Williams v Red Bank Bd. of Ed.*, 662 F.2d 1008 (3rd Cir. 1981), relied upon by petitioners, is clearly distinguishable since the plaintiff's complaint in that case did not allege bad faith or any facts similar, in quality or degree, that would provide the basis for inferring bad faith. *Williams* does not provide a factual scenario where the disciplinary body failed to comply with the very same law they were attempting to enforce, or where the court made a specific finding of animus, or where the defendants were engaged in an ongoing struggle to fire plaintiff, or where disciplinary charges went directly to the exercise of constitutionally protected political speech.

Conclusion

The First Amendment requires that the element of subjectivity be removed from the enforcement of any restriction upon content-based political speech. Because petitioners' arbitrary method of enforcing the 100-foot prohibition was pervasively subjective, it invited abuse and uneven application and actually undermined the "compelling state interest" in maintaining the integrity and reliability of petitioners' electoral process. Because petitioners were obviously not concerned with electioneering within the restricted zone, *per se*, but only with taking the opportunity to discipline respondent, their §3020-a proceeding was commenced and maintained in bad faith and was properly enjoined by the district court.

This Court should deny certiorari.

Dated: Goshen, New York
October 4, 1994

Respectfully submitted by:

ROBERT N. ISSEKS
(Counsel of Record)
40 Park Place
Goshen, NY 10924
(914) 294-7292

Attorney for Respondent

Of Counsel:
ALEX SMITH